

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	:	
	:	
Application For A Certificate Of Public	:	
Convenience And Necessity, Pursuant To	:	
Section 8-406.1 Of The Illinois Public	:	13-0657
Utilities Act, And An Order Pursuant To	:	
Section 8-503 Of Illinois Public Utilities	:	
Act, To Construct, Operate And Maintain	:	
A New 345 Kilovolt Transmission Line In	:	
Ogle, Dekalb, Kane And Dupage Counties,	:	
Illinois.	:	

PROPOSED ORDER ON REHEARING

By the Commission:

I. PROCEDURAL HISTORY

On December 2, 2013, Commonwealth Edison Company (“ComEd”) filed with the Illinois Commerce Commission (“Commission”) a Verified Petition seeking a Certificate of Public Convenience and Necessity (“CPCN”) pursuant to Section 8-406.1 of the Public Utilities Act (“PUA” or “Act”), authorizing ComEd to install, operate, and maintain an overhead 345kV high-voltage electric transmission line and associated facilities, referred to as the Grand Prairie Gateway (“GPG”) Project (“Project”). ComEd also sought an order authorizing or directing ComEd to construct the Project and related facilities pursuant to Section 8-503 of the Act.

On October 22, 2014, the Commission entered an Order (“October Order”) finding that ComEd possessed the managerial and financial resources to complete the proposed Project. The Order also found that the Project proposed by ComEd is necessary and appropriate under Section 8-406.1(f)(1) of the Act. The Commission generally approved the route proposed by ComEd incorporating an intra-parcel adjustment proposed by Kenyon Brothers Company (“Approved Route”). The Commission further issued a CPCN authorizing and directing ComEd to construct the Project and related facilities pursuant to Section 8-503 of the Act.

On November 12, 2014, the Commission received the first of several applications for rehearing pursuant to Section 200.880 of 83 Illinois Administrative Code Part 200, “Rules of Practice.” The “Muirhead Group,” an ad hoc coalition of landowners consisting of John Cash, Mary Lewis, Wayne Muirhead, Dean Muirhead, Dennis Muirhead, and Arlene Watermann, filed the instant Motion for Rehearing pertaining to a segment of the

Approved Route between the western edge of the Muirhead Springs Forest Preserve and the eastern boundary of Plato Center, Illinois. On November 25, 2014, the Commission granted the Muirhead Group's Motion for Rehearing, and denied a request for rehearing filed by the Forest Preserve District of Kane County ("FPDKC"). The Commission subsequently denied applications for rehearing of the October Order filed by: (1) Jerry Drexler, Kristine Drexler, William Lenschow, Thomas Pienkowski, Kristin Pienkowski, Robert and Diane Mason, John Tomasiewicz, Ellen Roberts Vogel, Sharon Payne, Charles Payne, Jeffrey Payne, and Utility Risk Management Corporation; and (2) the City of Elgin, Illinois.

On December 31, 2014, Michael and Sarah Petersdorf (the "Petersdorfs") together with Ellen Roberts Vogel, (the "SP Parties") filed a Petition for Leave to Intervene, which was granted on January 29, 2015.

Pursuant to due notice, and the Administrative Law Judges' December 23, 2014 Ruling, an evidentiary hearing was held on February 19, 2015.

The following witnesses testified on behalf of ComEd: Steven T. Naumann (ComEd Ex. 35.0, ComEd Ex. 35.01, ComEd Ex. 35.02, ComEd Ex. 37.0, ComEd Ex. 37.01, ComEd Ex. 37.02, ComEd Ex. 37.03, and ComEd Ex. 39.0); Donnell Murphy (ComEd Ex. 36.0, ComEd Ex. 40.0, and ComEd Ex. 40.01); and Susan E. Woods (ComEd Ex. 38.0 CORR., ComEd Ex. 38.01, ComEd Ex. 38.02, and ComEd Ex. 38.03). At hearing, the following ComEd Group Cross Exhibits were admitted into the record: ComEd Cross Group Ex. 5, ComEd Group Cross Ex. 6, ComEd Group Cross Ex. 7, ComEd Group Cross Ex. 9, and ComEd Group Cross Ex. 10.

Yassir Rashid testified on behalf of Staff (Staff Ex. 5.0).

John F. Cash testified on behalf of the Muirhead Group (Direct Testimony of John F. Cash; Response Testimony of John F. Cash).

Monica Meyers testified on behalf of FPDKC (Direct Testimony of Monica Meyers on Rehearing).

Michael Petersdorf testified on behalf of the Petersdorfs (Petersdorf Ex. 1.0, Petersdorf Ex. 1.1, Petersdorf Ex. 1.2, Petersdorf Ex. 2.0, and Petersdorf Ex. 2.1). Ellen Roberts Vogel testified on her own behalf (Vogel Ex. 2.0, Vogel Ex. 2.1, and Vogel Ex. 3.0). The following Cross Exhibits were entered on behalf of the SP Parties: SP Cross Ex. 2, SP Cross Ex. 6, and SP Cross Ex. 7.

The record was marked "Heard and Taken" at the close of the proceedings on February 19, 2015, subject to the post-hearing evidentiary filings for which leave to file had already been granted.

Initial Briefs were filed on March 3, 2015 by ComEd, Staff, the Muirhead Group, and the SP Parties. Reply Briefs were filed on March 10, 2015, by ComEd, the Muirhead

Group, and the SP Parties. In addition, both ComEd and the SP Parties filed Draft Proposed Orders.

On March 24, 2015, the ALJs issued their Proposed Order.

On March 31, 2015, Briefs on Exceptions ("BOE") were filed by _____.

On April 6, 2015, Reply Briefs on Exception ("RBOE") and Exceptions were filed by _____.

This Order considers all the positions and arguments set out in the exceptions, briefs and reply briefs listed above.

II. BACKGROUND

ComEd is a corporation organized and existing under the laws of the State of Illinois. ComEd is engaged in delivering electricity to the public in the northern portion of Illinois, and is a public utility within the meaning of Section 3-105 of the Act.

In the October Order, the Commission authorized ComEd to construct a 345kV transmission line from its existing substation in Byron, Illinois to its substation in Wayne, Illinois. ComEd plans to install one 345kV circuit breaker and associated equipment at the Byron Substation and two 345kV circuit breakers and associated equipment at the Wayne Substation. The Approved Route spans approximately 60 miles in length. The statutes and authorities governing the Commission's action on rehearing remain unchanged from those governing our original decision.

As relevant with respect to the proceedings on rehearing, the Approved Route approaches the western edge of the Muirhead Springs Forest Preserve along an existing railroad corridor utilized by the CN Railroad. Upon reaching the western edge of the forest preserve, the Approved Route turns due south until it reaches a point parallel to the forest preserve's southern-most point. The Approved Route then turns due east, passing to the south of the forest preserve and Plato Center until it reconnects with the CN Railroad on the eastern edge of Plato Center. At that point, the Approved Route proceeds along the railroad tracks towards the Wayne Substation.

III. MGRP ROUTE AND THE COMED CONDITIONAL REHEARING ALTERNATIVE ROUTE

In its Motion for Rehearing, the Muirhead Group asks the Commission to reconsider the Approved Route in favor of what the parties have generally referred to as the "Muirhead Group Rehearing Proposal" or the "Muirhead Group Rehearing Route" or "MGRP". According to the Muirhead Group, the MGRP would adhere to the existing railroad corridor from the western edge of the Muirhead Springs Forest Preserve to the eastern edge of Plato Center and then continue along the railroad tracks along the Approved Route towards ComEd's Wayne Substation.

In ComEd Witness Naumann's Direct Testimony on Rehearing, ComEd also identifies a potential alternative to the MGRP that uses Muirhead Springs Forest Preserve but does not run through Plato Center, subject to the caveat that ComEd would be able to obtain sufficient land rights across the Muirhead Springs Forest Preserve. Like the MGRP, the ComEd Conditional Rehearing Alternative would extend through the Muirhead Springs Forest Preserve parallel to the existing railroad tracks. After emerging from the eastern edge of the forest preserve, the ComEd Conditional Rehearing Alternative would continue approximately one-half mile along the railroad tracks until proceeding south for a distance of approximately 1,500 feet until it intersects with the Approved Route. The ComEd Conditional Rehearing Alternative would then pass to the south of Plato Center until it reconnects with the CN Railroad on the eastern edge of Plato Center. At that point, the ComEd Conditional Rehearing Alternative would proceed along the railroad tracks towards the Wayne Substation.

A. Muirhead Group's Position

The question before the Commission in this rehearing is straight-forward; it must determine which of three route proposals best satisfies the Commission's transmission siting criteria for the portion of ComEd proposed GPG project from the west side of the Muirhead Springs Forest Preserve to the east side of Plato Center. This question arose in response to what the Muirhead Group claims are two mischaracterizations contained in the Commission's October 22, 2014 Final Order: 1) that it was the position of the Forest Preserve District of Kane County ("FPDKC") that ComEd's Primary Route would have less of an impact on the Muirhead Springs Forest Preserve than the "FPDKC Adjustment Route" (passing directly through the Preserve along an existing CN railroad corridor), which in actuality is the opposite of FPDKC's preference; and 2) the lack of discussion of the length and cost reductions resulting from the FPDKC Adjustment Route.

The proposed routes at issue in rehearing are:

- 1) The MGRP Route, also referred to as the FPDKC Adjustment Route, which directly follows the CN railroad track corridor through the Muirhead Springs Forest Preserve and Plato Center.
- 2) The ComEd Conditional Rehearing Alternative route, which follows the CN railroad track corridor through the Muirhead Springs Forest Preserve, but then deviates south rather than passing through Plato Center, thereby bisecting property owned by a member of the Muirhead Group; or
- 3) The ComEd Primary Route, also referred to as the Approved Route, which follows the existing CN railroad track corridor, but then deviates to run south of and around the Muirhead Springs Forest Preserve, thereby bisecting property owned by members of the Muirhead Group and four other property owners;

The Muirhead Group argues that the MGRP Route is the least expensive and least impactful alternative, and therefore should be approved by the Commission. In the event that the Commission does not see fit to approve the MGRP, the Muirhead Group would ask that the Commission adopt the ComEd Conditional Rehearing Alternative, slightly modified as proposed by Mr. Cash in his Response Testimony on Rehearing, as it would be both less expensive and less impactful than the ComEd Primary Route.

Application of the Commission's Siting Criteria

As the noted in the October 22, 2014, Final Order in this docket, the Commission has set forth a series of twelve factors to consider when evaluating the comparative merits of various route proposals. Those factors are as follows:

1. Length of the line
2. Difficulty and cost of construction
3. Difficulty and cost of operation and maintenance
4. Environmental impacts
5. Impacts on historical resources
6. Social and land use impacts
7. Number of affected landowners and other stakeholders
8. Proximity to homes and other structures
9. Proximity to existing and planned development
10. Community acceptance
11. Visual impact
12. Presence of existing corridors

No individual factor is to be given priority over any others. Instead, the Commission is asked to engage in a comprehensive evaluation and balancing of all of the criteria based upon the evidentiary record. As shown below, the Muirhead Group states that after taking each of these factors into consideration, there can be no doubt that the MGRP Route best satisfies these criteria. Barring adoption of the MGRP, the ComEd Conditional Rehearing Alternative Route should be preferred over the ComEd Primary Route.

The MGRP Route is the Shortest, Lowest Cost and the Least Difficult to Construct, Operate and Maintain

The first several factors that the Commission is to consider relate to the length and complexity of the various routes to construct, operate and maintain. The Muirhead Group states that a simple examination of the data submitted into the record clearly shows that the MGRP Route is the shortest and least complicated route. The MGRP Route totals approximately 9,100 LF, and will only require construction of 12 towers. By comparison, the Muirhead Group points out that, at approximately 10,300 LF, the ComEd Conditional Rehearing Alternative is approximately 12% longer than the MGRP Route, and will require 13 towers. Finally, the ComEd Primary Route is by far the longest route being considered, totaling approximately 12,600 LF with 17 towers.

The Muirhead Group argues that, by reducing the length of the route and the number of towers, both the MGRP and the ComEd Conditional Rehearing Alternative routes present significant savings as compared to the ComEd Primary Route. As ComEd Witness Mr. Naumann states in his Direct Testimony on Rehearing, the MGRP Route is the least cost alternative, representing a savings of \$3.1 million as compared to the ComEd Primary Route. The ComEd Conditional Rehearing Alternative is the next best alternative from a cost standpoint, representing savings of \$1.4 million over the ComEd Primary Route.

Beyond the length of the route and the number of towers, the Muirhead Group states the main consideration relevant to the operation and maintenance of the proposed routes is the width of the right-of-ways. According to the Muirhead Group, for the purposes of this proceeding, each of the routes are approximately equal in this regard. At this time, the Commission has approved a single set of structures for the GPG, which require a right-of-way of between 110 – 120 feet. Though ComEd has mentioned the possibility of acquiring additional rights for future expansions and a second set of structures, they have not requested or received any authorization to acquire those additional rights as part of this proceeding, nor would it be appropriate for them to do so without presenting much more detailed information about their future expansion plans. On cross-examination, ComEd witness Mr. Naumann agreed that the transmission project that has been presented by ComEd in this proceeding can be developed within the 120 foot right-of-ways that the Commission has granted, and that there was sufficient existing CN railroad and ComEd right-of-way width through Plato Center to accommodate the project. Mr. Naumann also acknowledged that any plans for a future second set of structures are hypothetical. The Muirhead Group asks that the Commission not trade away the existing property rights to approve a more expensive route to be borne by ratepayers, based upon concerns of a hypothetical future inconvenience for ComEd.

The Muirhead Group states that a final issue relevant to the construction of the lines relates to the existence of certain title restrictions upon a portion of property held by FPDKC. As described by ComEd witness Mr. Murphy, ComEd does not currently hold the easement rights to pass through the Muirhead Springs Forest Preserve. Mr. Murphy

states that ComEd cannot obtain those easement rights because of deed restrictions placed upon the property. The Muirhead Group argues that this statement is incorrect.

As explained by FPDKC's witness, Ms. Meyers, the property in question was originally acquired by FPDKC through a combination of FPDKC funds and funds from the Illinois Department of Natural Resources ("IDNR") under the Open Space Land Acquisition and Development ("OSLAD") grant program. Specifically, when the property was acquired, OSLAD funds were used to purchase approximately 200 acres on the northern portion of the property (which is not currently at issue in this proceeding), and FPDKC funds were used for the remainder of the acquisition.

According to the Muirhead Group, when the property was purchased, the prior owners, including the Petersdorfs, did not place any restrictions on FPDKC's use of the property. In fact, pursuant to the OSLAD guidelines, the previous owners were required to transfer clear fee simple title to FPDKC, without any rights or reservations. The only restrictions placed upon the property related to the OSLAD program requirements, which mandated that certain restrictions be placed on the title to prevent development without first obtaining approval from IDNR. As testified to by Ms. Meyers of the FPDKC, these restrictions were only required to be placed upon the 200 northern acres of the property that were purchased with OSLAD funds. However, by mistake, FPDKC placed the restrictions on the entirety of the property. Recognizing this mistake, in March of 2006, IDNR provided a letter to FPDKC which the Muirhead Group argues releases the restrictions upon any property beyond the 200 acres acquired with OSLAD funds.

FPDKC has re-recorded the deeds without the IDNR restrictions for the portions of the property not purchased with OSLAD funds. As Ms. Meyers explains, FPDKC is currently working through the final resolution of this issue with its legal counsel and ComEd, including consideration of potentially pursuing a quiet title action to clarify that the restrictions do not apply to the southern portion of the property. They simply need more time, which would be provided in the period between the granting of a final order in this proceeding and the commencement of construction. In the meantime, FPDKC and ComEd have successfully negotiated an unexecuted Option Agreement, whereby FPDKC grants ComEd a permanent easement to cross the Preserve. This Option Agreement has been approved by the FPDKC Board and awaits ComEd's counter-signature.

The MGRP Route Minimizes Impacts on Environmental, Historical, Social and Land Use Resources by Utilizing Existing Corridors

The next group of factors for the Commission to consider relates to the routes' comparative impacts on environmental and historical resources. As with the construction and operational impacts, the MGRP Route's more direct approach on an existing railroad corridor helps to mitigate impacts compared to the other alternatives.

Looking first to the environmental impacts, both the MGRP Route and the ComEd Conditional Rehearing Alternative pass through the Muirhead Springs Forest Preserve,

while the ComEd Primary Route takes a longer path around the Preserve's border. Though MGRP and the ComEd Conditional Rehearing Alternative run through the Preserve, FPDKC has stated that it prefers this option because it runs along an existing railroad corridor and thereby minimizes the environmental disturbances.

The historical impacts cut more clearly in favor of the MGRP. As ComEd witness Mr. Murphy testifies, both the ComEd Primary Route and the ComEd Conditional Rehearing Alternative pass over an existing archaeological site, which the MGRP avoids. Mr. Murphy testifies that this archaeological site can be spanned, but that would necessarily add to the total cost of the project and still might subject the site to disturbances during construction.

Finally, it should be noted that any impact that might be had by the MGRP on environmental or historical resources would be mitigated by the fact that the MGRP is the only one to run its entire length along an existing railroad corridor. The additional activity required to construct and operate a transmission line along an existing railroad line will have far less impact than running a transmission line through otherwise undeveloped land, which both the ComEd Primary Route and the ComEd Conditional Rehearing Alternative propose to do.

The MGRP Route Has Approximately The Same Impact on Landowners, Homes, Structures, and Existing and Planned Development as the Other Routes

The next group of factors relates to the proposed routes' proximity to landowners, parcels and structures. While each of the proposed routes would have some impact on surrounding parcels, as discussed above, the MGRP Route's use of existing railroad corridors helps to mitigate these impacts. Under this same principle, by leaving the existing railroad corridor, the ComEd Primary and Conditional Rehearing Routes create more severe encroachments on surrounding parcels by cutting across property that was otherwise unburdened by large infrastructure rights-of-way.

Based upon the evidence in the record, it appears that each of the proposed routes has advantages and disadvantages when evaluating the impacts on surrounding parcels. The ComEd Primary and Conditional Rehearing Routes do not run through Plato Center, and therefore impact fewer landowners and parcels. However, the MGRP proposes to pass through Plato Center along an existing railroad corridor, so the impact upon surrounding parcels will be minimized by its co-location with an existing infrastructure corridor. As discussed above, all of the parties to this case, including ComEd witness Mr. Naumann, agree that the 120 foot right-of-way that has been approved by the Commission is sufficient for the development of the transmission lines that ComEd has proposed in this proceeding.

Additionally, the incremental impact on the properties that currently run along the railroad corridor, including those parcels held by Ms. Vogel and the Petersdorfs, would

be far less than the impact of deviating from the existing corridor. These properties are already subject to the burdens of existing next to an active railroad line.

By contrast, the Muirhead Group argues that the ComEd Primary Route and the ComEd Conditional Rehearing Route's deviation from the existing railroad corridor would create significant new burdens upon surrounding parcels. The ComEd Primary Route proposes to border the Muirhead Forest Preserve on three sides, rather than following an existing corridor. The FPDKC has testified that this plan would increase the impact on the Preserve. Similarly, by avoiding running along an existing corridor through Plato Center, the ComEd Conditional Rehearing Route proposes to create a new corridor that bisects property owned by members of the Muirhead Group. Though the total number of impacted landowners may be reduced by this proposal, the nature and extent of the impact far exceeds the incremental additional burden that would have otherwise been created by passing through Plato Center.

The MGRP Route Utilizes Existing Corridors

Much of the benefit of utilizing the MGRP Route stems from its use of an existing railroad corridor. This advantage is unique to the MGRP Route, as both the ComEd Primary Route and the ComEd Conditional Rehearing Route deviate from the existing railroad corridor, and in doing so significantly increase the overall impact of the project.

Muirhead Group Conclusion

According to the Muirhead Group, the MGRP Route best satisfies the Commission's transmission siting criteria as it is less expensive, creates less of impact on environmental and historical resources, and creates less of an onerous burden on surrounding land uses than the ComEd Primary Route. Thus, the Muirhead Group argues it presents a clear best alternative for the Grand Prairie Gateway project. After the MGRP Route, the Muirhead Group believes the ComEd Conditional Rehearing Alternative Route would be the second best alternative, as it also is less expensive, creates less of impact on environmental and historical resources, and creates less of an onerous burden on surrounding land uses than the ComEd Primary Route.

B. ComEd's Position

In its Initial Brief on Rehearing, ComEd points out that the evidence supporting the Approved Route remains unchanged. ComEd IBoR at 2-4. Despite extensive proceedings on rehearing, ComEd asserts that no party presented evidence that called the Commission's original conclusion that the Approved Route "is, in comparison, superior to any of the alternate proposals" into question. ComEd IBoR at 2-3. Further ComEd argues that the Muirhead Group's assertion that the MGRP is shorter and cheaper assumes that the FPDKC is willing, ready, and able to convey to ComEd all the necessary real estate rights. *Id.* at 3. ComEd explains that the evidence disproves this claim and shows that routes running through the Muirhead Springs Forest Preserve are not viable. *Id.*

In particular, ComEd argues that the FPDKC has no authority to grant the land rights required to construct the Project through the Muirhead Springs Forest Preserve. *Id.* at 4-6. ComEd explains that a property owner may generally transfer only their own interests in land, and that any transfer will be subject to applicable restrictive covenants. *Id.* at 4 (citing *Hays v. St. Paul M.E. Church*, 196 Ill. 633, 635 (1902)). As ComEd makes clear, the evidence on rehearing, including testimony and the applicable deeds themselves, shows that the FPDKC parcels that the Project would cross if the Project is built through the forest preserve are subject to restrictive covenants that, on their face, prohibit construction of a transmission line. ComEd recalls that the two most significant FPDKC parcels at issue were originally conveyed in 2003 subject to the limitation that the properties would be maintained for public outdoor recreation use purposes only. *Id.* at 5 (citing Woods Reh. Supp. Dir., ComEd Ex. 38.0 CORR., 3:50-60 (quoting ComEd Ex. 38.02)). Ms. Woods further explains that the deeds for all three FPDKC parcels were later re-recorded and established restrictive covenants that would be similarly inconsistent with the Project. *Id.* at 5-6 (citing ComEd Ex. 38.0 CORR at 3:61 – 4:92).

ComEd additionally contends that despite extensive good faith efforts by ComEd and FPDKC, it is clear that the FPDKC is unable to obtain the requisite releases. As ComEd points out, the grantors of the applicable deeds, some of whom are represented in this proceeding, maintain their right to enforce the pertinent restrictions and have made clear in this proceeding and elsewhere that they would not release those restrictions to accommodate the Project. *Id.* at 6.

ComEd points out that the Commission should not impose added risk, cost, and uncertainty on the Project by approving a route across the Muirhead Springs Forest Preserve. *Id.* First, ComEd recounts that the parties (other than the Muirhead Group) generally agree that the aforementioned deed restrictions preclude constructing the Project across the properties at issue. Second, ComEd asserts that title insurance would not resolve the dilemma posed in this case. *Id.* at 7. ComEd states that the title insurance commitments covering these parcels list the pertinent deed restrictions as “exceptions” to the FPDKC’s title, i.e., risk matters for which the title insurance company will not assume coverage. See Woods Reh. Supp. Dir., ComEd Ex. 38.0 CORR., 5:118-20. Moreover, ComEd contends that title insurance would not cover the risk that some entity might seek to enforce the applicable restrictions sometime after the Project is substantially complete. ComEd additionally points out that any title insurance coverage would be contractually limited and it would be near impossible for ComEd to acquire a policy sufficient to cover the Project’s \$277 million cost of construction, let alone the Project’s proven customer benefits.

ComEd also points out that land rights across a forest preserve district in Illinois can only be obtained through mutual agreement of the parties and cannot be condemned through the exercise of eminent domain authority. ComEd IBoR at 8. ComEd explains that Section 8-509 of the PUA only applies to private properties and that Section 70 ILCS 805/5e specifically exempts forest preserve districts from eminent domain or condemnation proceedings.

ComEd notes that the question of whether a court would ultimately find that the deed restrictions could be voided or unilaterally released is beside the point. *Id.* ComEd states that it does not now have clear title to the FPDKC properties, and cannot obtain such title until the original grantors, and several other parties all execute releases. *Id.* ComEd argues that the risk is far too great for ComEd to proceed under these circumstances. *Id.* at 9.

Moreover, ComEd notes that even if it could ultimately gain the necessary land rights, the additional time that would be required to obtain clear title could make a route across the Muirhead Springs Forest Preserve more expensive and not least-cost. *Id.* ComEd states that the ComEd Conditional Rehearing Alternative would theoretically cost only \$1.4 million less than the Approved Route, but that figure excludes the cost of acquiring the necessary land rights. ComEd adds that delays to the Project's in-service date cost Illinois customers about \$70 million in benefits annually. Consequently, ComEd concludes that a delay of just over a week exhausts all of the theoretical construction-cost savings, even setting aside the cost of acquiring land rights on those parcels. *Id.* In sum, ComEd asserts that ordering ComEd to construct the Project across the MSFP would saddle the Project with uncertainty, imperil its constructability, and threaten to deprive ComEd's customers of the Project's demonstrated benefits. *Id.* at 9-10. In its Reply Brief on Rehearing, ComEd refutes the Muirhead Group's claims that the MGRP is superior to the Approved Route, clarifying the record in several respects. First, ComEd points out that restrictions that would bar use of the properties in question for electric transmission were included in the deeds at the time that the FPDKC first acquired the properties in 2003. ComEd Reply Brief on Rehearing at 3-4. The fact that the deeds were subsequently re-recorded does not prevent the deeds' beneficiaries from seeking to enforce those restrictions.

ComEd also argues that there is no evidence that any of the deed restrictions were mistakenly established. *Id.* at 4-5. To the contrary, ComEd explains that the restrictions first applied to the properties in 2003 precisely reflect the grantors' intent. ComEd further asserts that FPDKC intentionally applied the 2005 restrictions to all three properties in their entirety, but only later sought to modify the OSLAD-related project boundaries after deciding that there were insufficient funds to restore all 525 acres at once. Additionally, ComEd points out that FPDKC witness Monica Meyers never testified that any of the deed restrictions were recorded in error. *Id.* at 5.

ComEd moreover disputes the Muirhead Group's claim that the Illinois Department of Natural Resources ("IDNR") has released the restrictions governing the FPDKC properties. *Id.* 5-6. ComEd explains that the 2006 letter described by Monica Meyers and the Muirhead Group merely approved the FPDKC's proposed modification of the OSLAD "project boundaries" but made no reference to the recorded deed restrictions or purported to release the applicable deed restrictions. Lastly, assuming arguendo that the aforementioned letter released the applicable restrictions, ComEd argues that such a release would be subject to the conditions described in Meyers' August 2005 letter to IDNR, in which FPDKC committed to expand the restoration to include the entire parcel and keep all of the land as public open space as restored forest preserve. *Id.* at 9.

In addition, ComEd asserts that overcoming the barriers to use of the Muirhead Springs Forest Preserve is not simply a matter of time, as the Muirhead Group claims. *Id.* at 6-7. ComEd further observes that the grantors of those restrictions have already refused to release the deed restrictions and will continue to do so. Moreover, ComEd points out that Monica Meyers testified that FPDKC has no plans to initiate a legal action to quiet title. And, even if FPDKC did initiate such a legal action, ComEd warns that such litigation could be prolonged and is inconsistent with its immediate need for clear title.

ComEd also argues that the delay suggested by the Muirhead Group is inconsistent with the PUA, which requires rehearing proceedings to be resolved within 150 days. *Id.* at 7.

ComEd further avers that the risks and costs of a route across the Muirhead Springs Forest Preserve weigh heavily against the MGRP and the ComEd Conditional Rehearing Alternative. *Id.* at 8. Regardless of whether FPDKC may at some point overcome the deed restrictions, or whether the Muirhead Group has a stronger legal argument, ComEd argues that it cannot build a permanent transmission line on property for which it may be unable to obtain clear title.

However, even if ComEd could acquire rights across the Muirhead Springs Forest Preserve, ComEd contends that the Muirhead Group cannot show that such a route should otherwise be approved. *Id.* at 9-10. First, ComEd contends that a route across the Muirhead Springs Forest Preserve is not least cost. In particular, ComEd points out that the Commission's least-cost analysis includes more than just construction-cost. ComEd further asserts that the purported construction savings cited by the Muirhead Group do not include the cost of acquiring the necessary land rights, which in this case would likely include the cost of lengthy litigation. Even then, ComEd notes that there can be no guarantee that such litigation would be successful, but those costs would inevitably be passed on to customers. Furthermore, ComEd points to the cost of delaying the Project's in-service date, which ComEd suggests must also be taken into consideration. As ComEd explains, the record shows that the Project will save customers roughly a quarter-billion dollars and, in the interim, customers are losing out on nearly \$70 million annually in credits. Thus, ComEd concludes that the losses attributable to even a short delay would far exceed the construction-cost savings cited by the Muirhead Group.

Furthermore, ComEd contends that the Muirhead Group has no answer for the considerations that led ComEd to conclude that a route through Plato Center is unsuitable in the first place. *Id.* at 10-11. For instance, ComEd first argues that it is sound and accepted utility and planning practice to consider the demonstrated future needs for transmission development in a sitting case where that future development will occur within the planning horizon. In this case, ComEd points out that the Commission has already recognized the need for additional lines in the future. As ComEd explains, these needs cannot be ignored. ComEd similarly asserts that a route through Plato Center would necessarily require ComEd to either condemn and demolish buildings in Plato Center to accommodate those additional lines or to acquire a separate right of way to the south and west of Plato Center. Moreover, ComEd states that the routes available at that time would

likely be the same routes as those now before the Commission. In this respect, ComEd observes that the MGRP would merely delay the inevitable course of installing a future transmission line to the south and west of Plato Center, but only after ComEd constructs the Project through the middle of Plato Center.

Lastly, ComEd refutes the Muirhead Group's claim that a route through Plato Center would have a lower impact on the surrounding area than the Approved Route or the ComEd Conditional Rehearing Route. *Id.* at 11-12. ComEd recalls that a route through Plato Center would impact the community in ways that a route across undeveloped land would not. For example, ComEd notes that a route through Plato Center would run closer to numerous homes, a youth baseball park, a fire station, town hall and a day-care center. ComEd concludes that a route through Plato Center "is clearly inferior to the ICC Approved Route which can be built at reasonable cost and without such impacts, can accommodate future expansion, and in relevant part traverses 'undeveloped land' occupied by no more than two homes." *Id.* at 12 (citations omitted).

C. Staff's Position

Staff points out that ComEd identified several issues with the MGRP. First, the route "runs directly through Plato Center where the available right-of-way is not wide enough to allow for required expansion even over the relatively short term, at least without demolishing buildings." (ComEd Ex. 35.0 at 2.) To address these concerns, ComEd proposed an alternative route referred to as the "ComEd Conditional Rehearing Alternative." *Id.* This route passes through the Muirhead Springs Forest Preserve but avoids Plato Center. *Id.* ComEd explained that "the ComEd Conditional Rehearing Alternative route, like the approved route, is wide enough to accommodate the additional poles that will be necessary in the future." *Id.* at 7. However, both proposed routes occupy "FPDKC property over which ComEd has no rights and cannot acquire via eminent domain and that contains deed restrictions that may preclude construction of a transmission line." *Id.* With respect to the deed restrictions, ComEd explained that "[u]nless the parties who could potentially attempt to enforce the deed restrictions release or convey their rights, negotiations with solely the FPDKC cannot provide ComEd with the required real estate rights." (ComEd Ex. 38.0 CORR. at 6.)

ComEd concluded that a necessary condition of ComEd's alternative is the successful acquisition by ComEd of property rights within the Muirhead Springs Forest Preserve, i.e., agreement with the FPDKC and resolution of the deed restrictions. (ComEd Ex. 35.0 at 2.)

Staff witness Yassir Rashid noted that while the MGRP appears to be shorter, implying that it would be less costly, he nonetheless shared "ComEd's concern regarding the proximity of the transmission line to buildings at Plato Center, which may hinder ComEd's ability to build future transmission lines along this right-of-way." (Staff Ex. 5.0 at 4.) Mr. Rashid also recognized that the successful acquisition of property rights by ComEd within the Muirhead Springs Forest Preserve was necessary to construct the transmission line. *Id.* at 5. Mr. Rashid recommended that the Commission only alter the

route approved in the October 22 Order if ComEd was able to successfully acquire those rights, and, should those rights be acquired, approve the ComEd Conditional Rehearing Alternative. *Id.*

ComEd has been unable to successfully acquire property rights within the Muirhead Springs Forest Preserve. (ComEd Ex. 39.0 at 2.) Specifically, the releases of the deed restrictions identified by ComEd have not been obtained. As such, Staff witness Mr. Rashid's conclusion is that ComEd will not be able to use the Muirhead Springs Forest Preserve for the purpose of the transmission line, and the route approved by the Commission in the October 22 Order remains the least cost route.

ComEd has been unable to obtain the property rights within the Muirhead Springs Forest Preserve necessary to construct the GPG transmission line along either the MGRP or the ComEd Conditional Rehearing Alternative. Therefore, the Commission should reaffirm the Primary Route approved in the October 22 Order because it is the least-cost route.

Staff witness Mr. Rashid recommends that the Commission direct ComEd to include a map for the approved route, including the Kenyon Brothers adjustment, after the conclusion of these proceedings. (Staff Ex. 5.0 at 5.) No party objected to Mr. Rashid's recommendation.

D. SP Parties' Position

The SP Parties point out that the deeds by which Robert Muirhead (the Father of intervenor Sarah Petersdorf) transferred much of the land which now comprises the Muirhead Springs Forest Preserve in 2003, including land over which either of the two alternative routing alternatives would cross, contained a significant, express restriction on the land's use. They noted that ComEd presented evidence that the inclusion in the original recorded deeds, and continued existence, of the restrictions prevents ComEd from utilizing either of the two alternative routing adjustments.

In his Response Testimony, Michael Petersdorf aptly described the original deed restrictions and their continued effectiveness, as follows:

Although I am not an attorney, from the plain reading of the subject restrictions, I believe that (1) the restrictions do prohibit the FPDKC from allowing electric transmission lines on the subject parcels; (2) that the hand-drawn cross-outs of the restrictive language, which appear to have been done in mid-2014, were done with neither the knowledge nor consent of any of the persons or parties who deeded the parcels to the KCFPD; (3) the persons and parties that deeded those parcels received nothing in exchange for any purported elimination of the restrictions; and (4) the restrictions for all 3 deeds and parcels remain in effect.

Petersdorf Ex. 2.0 at 2:13-21.

The SP Parties also note that the record shows that neither Mr. Petersdorf nor his wife, Sarah, had any knowledge of the purported striking of the restrictions prior to them becoming known during the rehearing process. *Id.* at 3:30-32. Sarah is a Manager and Member of the legal entity, Muirhead Hui, LLC, that transferred one of the parcels in question to the FPDKC in 2003. *Id.* at 3:32-34; Tr. at 146:18-22 – 147:1-6, 152:13-15 (Feb. 19, 2015). If they were approached about consenting to a release of the restrictions, they would refuse to do so. Petersdorf Response Testimony (Reh'g), Petersdorf Ex. 2.0 at 3-4:39-49; Tr. at 153:1-6, 19-22, 154:1-22, 155:1-4 (Feb. 19, 2015). Good reason existed at the time of the restrictions and for their continued existence and effectiveness today. They were not arbitrary or unreasonable. Mr. Petersdorf testified that the property restrictions:

were an integral part of the property transfers, partly in order to protect our remaining acres and improvements, most importantly our Frank Lloyd Wright-designed Farm House. It seems inconsistent with the parcel transfers and the mission and purpose of the FPDKC, to now attempt to unwind part of the transfers in order to serve a different purpose that we do not understand.

Petersdorf Ex. 2.0 at 3-4:44-49.

As further evidence of their position that the subject restrictions should not have been crossed out and the deeds re-recorded, during cross-examination of Mr. Petersdorf, counsel for ComEd elicited that counsel for the Petersdorfs recently sent a demand letter to counsel for the FPDKC concerning a release of the deed restrictions. Tr. at 155:5-22, 156:1-11.

The record on rehearing amply demonstrates the absolute impediments the restrictions impose to routing a high voltage electric transmission line across land deeded to the FPDKC to which the restrictions attached and continue to apply. ComEd witnesses Mr. Naumann and Ms. Woods thoroughly explained why the restrictions, despite the attempted unilateral, unapproved striking through hand-drawn cross-outs and re-recording of deeds, prevent ComEd from utilizing the parcels in question for its transmission line. Naumann Supp. Direct (Reh'g), ComEd Ex. 37.0 at 1-2:18-24, 3-4:51-77; Woods Supp. Direct (Reh'g), ComEd Ex. 38.0 CORR; Naumann Reb. (Reh'g), ComEd Ex. 39.0 at 1-2:16-30. Exhibits introduced during cross-examination further reinforced the evidence as to the continued effectiveness of the restrictions and the FPDKC's futile attempts to get the property grantors to release them. ComEd Group Cross Ex. 5 (data requests and responses describing, and providing copies of, communications between counsel to the FPDKC and counsel to the grantors). Indeed, if the FPDKC considered the restrictions to have been effectively and legally removed and rendered no longer effective, then we must question the necessity its efforts to get the property grantors to release the restrictions.

The SP Parties point out that any alleged statements, or non-statements, by any of the grantors concerning the restrictions may not be given legal effect due to the fact that the restrictive language contained in the deeds is clear and unequivocal, and may not thereby be negated by alleged extrinsic evidence. As the SP Parties state, the fact that the above-described deed restrictions imposed by the grantors were similar in wording to restrictions imposed by the IDNR does not detract from their legal effectiveness. It is enough that the grantor restrictions were an integral part of the deeds, applicable to the properties conveyed, were not released by the grantors, and by their terms would prohibit construction of the GPG transmission line on the properties. No one has suggested the restrictions language is ambiguous; rather, everyone agrees that the language, if given effect, serves to prohibit a transmission line.

As the SP Parties argue, the principal function of a court in construing a written instrument is to give effect to the intention of the parties as expressed in the language of the document when read as a whole. Where the language is clear and definite, there is no need for judicial interpretation. *Sol K. Graff & Sons v. Leopold*, 92 Ill.App.3d 769, 416 N.E.2d 275, 277 (1st Dist. 1981) (provisions of a real estate lease prohibiting signs were not ambiguous). The grantor restrictions in the subject deeds are clear and definite.

The SP Parties also point out that MG also has not alleged the essential elements required for a reformation of the deeds. Specifically, Illinois law requires that, for a court to find reformation an appropriate remedy applicable to a written instrument, the party seeking reformation must prove by clear and convincing evidence that the parties had a clear and actual meeting of the minds which the written instrument does not accurately reflect. *LaSalle Nat'l Bank v. Kissane*, 163 Ill.App.3d 534, 516 N.E.2d 790, 793 (1st Dist. 1987). MG has neither argued for reformation of the deeds nor alleged, let alone proved, facts sufficient to support such a remedy.

As the SP Parties further note, the three deeds in question and ancillary documents that were reproduced in ComEd Ex. 38.02 also contained restrictions on use imposed by IDNR, apparently as a condition of the grants to the FPDKC. See ComEd Ex. 38.02, pp. 7, 25, 39. The evidence shows, however, that when the IDNR released the FPDKC from utilizing the grant proceeds on the southern portions of the properties, outside of the northern 200 acres, the IDNR did not release the southern properties from the use restrictions. Nothing in the letters from the FPDKC to the IDNR included a request for such relief, and nothing in the responding letters from the IDNR granted such a release. *Id.*, pp. 9-13, 27-31, 41-45. That is likely why ComEd witness Ms. Woods testified that the IDNR could still possibly enforce the IDNR-imposed restrictions. Woods Supp. Direct, ComEd Ex. 38.0 CORR., 4-5:104-105.

Lastly, the SP Parties countered MG's assertion that the Illinois Outdoor Recreation Grant Programs OSLAF/LWCF, 2014 Local Participation Manual ("Grant Manual"), serves to negate or render ineffective the grantor restrictions. In his cross examination of Ms. Meyers, counsel for Cash selectively picked out a single provision that states, "No land rights or reservations can be retained by the seller unless approved by the DNR." Cash Cross Ex. 3, p. 23. Neither the FPDKC nor MG offered the version of

the Grant Manual in effect when the properties were conveyed and grants received, instead relying on a version that is ten years removed from the relevant time period. Even assuming, however, that the quoted provision also appeared in the version in effect ten years earlier, the provision does not render the grantor-imposed restrictions nullities or otherwise negate their effectiveness. When the local agency requesting a grant (i.e., FPDKC) sends its billing request to DNR for grant reimbursement, the agency is to include a copy of the recorded deed. Cash Cross Ex. 3, p. 24; see also *Id.*, pp. 13, 14 (agency to provide commitment for title insurance or other device that identifies property encumbrances; copy of property deed must be filed with DNR as part of the application).

Here, as the SP Parties point out, the restrictions language imposed by the grantors on two of the three properties in question was identical to that imposed by the IDNR. Also, presumably the IDNR saw, and it certainly had notice of, the grantor-imposed restrictions when the FPDKC provided the deeds. The record does not show whether the FPDKC provided a title commitment, so we cannot confirm that any title commitments at the time noted the grantor-imposed restrictions as exceptions. It is logical that the IDNR would have approved of the grantor-imposed restrictions, based on their similarity to those imposed by the IDNR itself. Nevertheless, the fact that the grantor-imposed restrictions were present and not released makes them effective today, even if, *arguendo*, they were in technical violation of a grant guideline. The remedy, if any, for such a technical violation, was to deny or require a return of the grant, and not to render the grantor-imposed restrictions no longer effective.

E. Commission Analysis & Conclusion

Based on a thorough review of the evidence on rehearing, the Commission finds that the Project should be constructed along the Approved Route as described in the October 22, 2014, Final Order.

The record shows that the relevant parcels that comprise the Muirhead Springs Forest Preserve may be subject to a series of deed restrictions that appear to preclude use of those properties for the Project. All parties seem to agree that FPDKC acquired two of the three relevant parcels in 2003 through deeds that contain restrictive covenants that purport to require that the properties be maintained only for public outdoor recreation use. FPDKC asserts that the parties intended that the transfers should have been made without restrictions. The heirs of the grantors disputed this contention at the hearing.

In 2005, in connection with FPDKC's pursuit of OSLAD funding for restoration of the properties, all three parcels were subjected to an additional series of deeds with restrictive covenants, which also require, among other things, that the properties be maintained for public outdoor recreation use only. The Muirhead Group claims that these deed restrictions were mistakenly placed on all 525 acres rather than just the northern 200 acres that were acquired with OSLAD funding.

FPDKC agrees with the Muirhead Group that the inclusion of the deed restrictions on the entire 525 acres was a mistake. Since at least 2006, it has attempted to remove

the deed restrictions on the lower 325 acres, including the narrow strip of land constituting the MGRP Proposal. The FPDKC's efforts to lift the restrictions included obtaining the consent of IDNR to their removal and rerecording the deeds with the restrictions crossed off the documents. However, at least some of the parties that may be entitled to enforce those requirements have already refused to grant FPDKC a release and have made that intent clear in this proceeding. We agree with Staff and ComEd that adopting the MGRP Project is not warranted.

No legal action to establish clear unrestricted title to this property has been initiated. No party to this proceeding has presented a title insurance policy for the subject property waiving the restrictions. ComEd presented evidence that title insurance, if it were available, would not remove the legal impediments to building a transmission line along its edge. The Commission rejects the Muirhead Group assertion that granting the FPDKC more time to clear title through an unfiled legal action is a reasonable course of action. The cost of delaying the project for this hypothetical scenario to play out exceeds the benefit it would achieve.

Therefore, the Commission rejects the MGRP and the ComEd Conditional Rehearing Alternative. FPDKC's ability to convey unrestricted ownership of the land at issue in this proceeding has been challenged by interested parties. The Commission will not require ComEd to incorporate the MGRP or the ComEd Conditional Rehearing Alternative into its route given the existence of asserted claims that this use is barred by deed restrictions. Because the Commission rejects the ComEd Conditional Rehearing Alternative, the Cash modification to that route is moot.

The Commission has previously expressed "grave reservations" with ordering ComEd to construct a transmission line across forest preserve district properties "in light of the fact that ComEd may be unable to obtain necessary easements even with eminent domain authority." *Commonwealth Edison Co.*, Docket No. 07-0310 (Order, Oct. 8, 2008). Therefore, the Commission concludes that the Approved Route remains least-cost and, in comparison, superior to any of the alternatives.

As the Commission found in its October Order, the Project "represents an opportunity to achieve numerous uncontested benefits and will be directly cost beneficial to customers." October Order at 24. In particular, Staff estimated that the Project's net benefits will range between \$121.1 million to \$324.6 million. The Project will also substantially increase transmission capability between the eastern and western portions of the ComEd zone, which is currently transmission constrained, and reduce the cost to serve load in the ComEd zone.

Moreover, the Approved Route would traverse undeveloped farm land and have less impact on Plato Center than the MGRP, which would run through that community. Furthermore, the MGRP would likely preclude the possibility of expanding the right-of-way at issue in this proceeding to accommodate future transmission expansion that may soon be necessary. The added cost of now approving a route that may be incapable of meeting identified future needs exceeds any short-term construction-cost savings.

IV. FINDINGS AND ORDERINGS PARAGRAPH

Having considered the entire record herein and being fully advised in the premises, the Commission is of the opinion and finds that:

- (1) ComEd is a public utility as defined in Section 3-105 of the Public Utilities Act;
- (2) the Commission has jurisdiction over ComEd and the subject matter of this proceeding;
- (3) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the evidence and are hereby adopted as findings herein;
- (4) the Approved Route between the western edge of the Muirhead Springs Forest Preserve and the eastern edge of Plato Center, Illinois is adopted, as discussed in the prefatory portion of this Order;
- (5) all other findings and conclusions contained in the October Order should remain unchanged; and
- (6) all motions, petitions, objections, and other matters in this proceeding which remain unresolved should be disposed of consistent with the conclusions herein.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the Certificate of Public Convenience and Necessity issued in this docket to Commonwealth Edison Company pursuant to Section 8-406.1 of the Public Utilities Act on October 22, 2014 shall not be modified to reflect the modification sought by the Muirhead Group.

IT IS FURTHER ORDERED that ComEd is directed to file a map of the approved route, including the Kenyon Brothers adjustment with the Commission.

IT IS FURTHER ORDERED that all other findings and conclusions contained in the October 2014 Order remain unchanged.

IT IS FURTHER ORDERED that all motions, petitions, objections, and other matters in this proceedings which remain unresolved are disposed of consistent with the conclusions herein.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED:
BRIEFS ON EXCEPTIONS DUE:
REPLY BRIEFS ON EXCEPTIONS DUE:

March 24, 2015
March 31, 2015
April 6, 2015

Terrance A. Hilliard
Heather Jorgenson
Administrative Law Judges